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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1050

KYLE DAVENPORT,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Sixth Circuit
and
BRIEF IN SUPPORT THEREOF

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The petitioner and appellant below was indicted in four counts, the first three of which charged the petitioner with selling and transferring to one Private Chester E. Ruggs, gasoline without requiring and receiving in exchange therefor, valid gasoline rationing coupons, in violation of Title 3, Section 2 (a) of the Second War Powers Act of 1942, and the Gasoline Rationing Regulations duly pro-

mulgated thereunder. The fourth count charged the petitioner with the same offense, the alleged purchaser of the gasoline being one Corporal Andrew L. Orfice (R. pp. 4-7).

Defendant entered a plea of not guilty to the indictment and each count thereof (R. p. 8).

At the conclusion of all the proof, the Court directed the jury to return a verdict of not guilty as to the fourth count, and the jury returned a verdict of not guilty as to said count (R. pp. 10-11, 194).

The defendant was found guilty under the first, second and third counts of the indictment and was sentenced to one year imprisonment under each count, said sentences to run consecutively, and in addition thereto, the defendant was fined $2,000.00 under each of the first and second counts of the indictment and $1,000.00 under the third count, making a total fine assessed against him of $5,000.00 (R. pp. 10-11).

The Issue of the guilt or innocence of petitioner was strongly contested in the trial court and petitioner introduced a large number of witnesses including himself in support of his plea of not guilty (R. pp. 106-189).

The case was tried to a jury and the trial court instructed the jury with respect to circumstantial evidence as follows:

> "In this case the Government relies both on direct evidence and on circumstantial evidence, and the Court charges you that presentation by the Government of circumstantial evidence is a proper way of making out a case. In many criminal cases it is the only way in which the Government can proceed in making out a case. *Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime. Crimes are usually performed in*

secret, and in a large number of cases the fact of guilt, if it exists, can only be established by the proof of circumstances. Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind. Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt. On the other hand, they may be very weak and very obscure, so weak and obscure as to leave in your minds a reasonable doubt. To use a common illustration, if you are tracking an animal in the snow, or in the earth, that is moderately soft but not tenacious enough to retain an impression, you can know with reasonable certainty if you see a track in the snow or on the ground, whether or not it is a cow track or horse track, that is, if you know those animals and the tracks they leave; but where there is a clear impression, you did not see the animal pass, but yet there is a clear track which identifies the animal and makes you know, as reasonable minded men, that shortly before such an animal passed that way. On the other hand, the track may be very obscure, the ground may be too hard, or so soft that the track has washed out in the soft mud, or it may be obscured by the track of some other animal, and although you know the difference between the track of the horse and a cow, you cannot possibly tell from the track which animal passed that way. So it is in the criminal law, the track which the criminal left if circumstantial evidence is relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not identify the criminal beyond a reasonable doubt.

Further, the rule applying to circumstantial evidence is that the circumstances relied upon must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis except the hypothesis of guilt. If they do not do so, or if you believe the circumstances proven to be as consistent

with innocence as with guilt, it would be your duty, and you should acquit the defendant." (Italics ours). (R. pp. 203-205).

At the conclusion of the charge of the trial court and before the jury retired to consider of its verdict, the foregoing instructions were excepted to by counsel for petitioner in the following language: "The defendant further excepts to the statements made in your Honor's charge that the Government relies on circumstantial evidence" (R. p. 206).

The questions involved herein are:

(a) Is that part of the trial court's charge on circumstantial evidence, which is intalicized, and especially the last sentence thereof, an invasion of the province of the jury and erroneous, in that the trial court assumed that a defendant in a criminal case, is a criminal and guilty of the offense charged where circumstantial evidence is relied upon by the Government, leaving to the jury only the question of whether the criminal left sufficiently plain tracks of his guilt?

(b) Was a sufficient exception taken by petitioner to the trial court's charge on circumstantial evidence?

(c) Did the concluding paragraph of the Court's charge on circumstantial evidence, which is not italicized, cure the said italicized portion of the charge so that the trial court's charge on circumstantial evidence, taken as a whole, was not erroneous?

The United States Circuit Court of Appeals for the Sixth Circuit filed no written opinion, but by order entered February 17, 1945, erroneously held and adjudged that no *reversible error* appeared from the record and affirmed the judgment of the District Court (R. p. 213).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit Court of Appeals by its decision and order of February 17, 1945, sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its Docket, No. 9830, Kyle Davenport, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court, and have such further relief as to this Court may seem proper.

Dated March 10th, 1945.

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